REMARKS

I. Status of Claims

Claims 140-154 are currently pending. No claims are amended herein.

II. Grounds of Rejection

Claims 140-154 stand rejected under the judicially-created doctrine of obviousness-type double patenting as allegedly obvious over claims 1-19 of U.S. Patent No. 6,441,026 to Bissery et al ("the '026 patent"). The '026 patent contains claims reciting a pharmaceutical composition comprising a cyclopropyl taxane species in combination with various other anti-cancer agents, as well as claims to methods of administration.

According to the Office, the current claims are obvious over the claims of the '026 patent "because the currently claimed cyclopropyl taxotere has been disclosed by [the] Bissery patent which is useful to treat a variety of cancer diseases . . . . There is not a patentable distinctness between the current compound and the composition of Bissery since the composition is in use[1] for medical practice and it comprises the compound (the major ingredient[2]) and a pharmaceutical carrier[ ]." Office Action at 2.

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[1] Applicants do not understand what the Office means by "in use." Further Applicants point out that the term, "pharmaceutical carrier," is not an element of either the pending claims or the '026 patent claims.

[2] By "major ingredient," Applicants assume that the Office means the compound that is the subject of claim 140, rather than a compound that is present as a major constituent (i.e., as by weight relative to the total weight of the composition) of the composition.

III. Arguments

It is clear that previous explanations have not been sufficient to demonstrate patentability of the claims in this complex proceeding. Consequently, Applicants will endeavor to explain even more clearly herein that the genus claim 140, species claim 142, and intermediate claim 141 have already been held, numerous times, by the USPTO to be patentably distinct from each other. As will be explained below, at least for the genus and intermediate claims 140 and 141, those holdings essentially defeat the public policy argument relied on by the Office in making its double patenting rejection. Furthermore, most likely, the Federal Circuit would require the Office to apply a one-way or two-way test to assess the issue of double patenting. Under a two-way test, which is the proper test to be applied in the present situation, all of the claims are separately patentable over the claims of the '026 patent, completely defeating the Office's position of double patenting.[3] Even under the more stringent one-way test, at least claim 141 is separately patentable over the claims of the '026 patent. Finally, new information will be brought to the Examiner's attention.

The pending claims, 140-154, can be described as follows:

Claims 140, 143, 145, 147, 149, 151, and 153 recite the genus of compounds and methods of using that genus of compounds;

Claim 141 recites an intermediate compound; and

Claims 142, 144, 146, 148, 150, 152, and 154 recite a species compound and methods of using the species.

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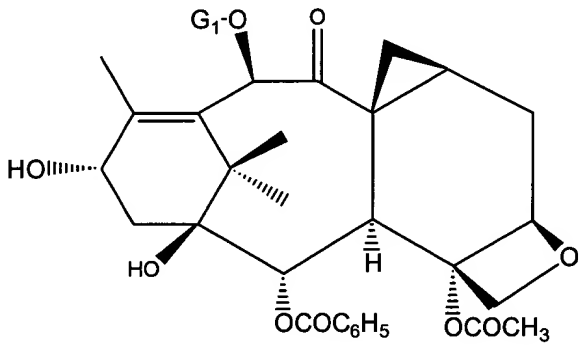
[3] The basis for entitlement to the two-way test is fully explained in the attached Appendix, specifically incorporated by reference herein, and will not be discussed herein.

To frame the following discussion, Applicants point out that all the claims of the '026 patent, the basis for the double patenting rejection, recite combinations of the species of present claim 142 with at least one other anti-cancer agent and methods of administering such combinations. Hence, the '026 patent discloses and claims no combinations reciting, *inter alia*, the genus of present claim 140 or any intermediate of claim 141.

A. <u>The Intermediate – Claim 141</u>

Not specifically discussed in the Office Action, claim 141 recites a taxoid of the formula:



in which G_1 represents hydrogen or acetyl.

Useful to prepare the species and genus compounds of claims 140 and 142, this intermediate can thus be used to prepare the species recited in all of the '026 patent claims. As will now be explained, the intermediate is in no way an obvious variant over either the species claim 142 or any of the '026 claims, all reciting, *inter alia*, that species. Thus, under application of either the one-way or the two-way test for obviousness-type double patenting, claim 141 is not obvious over any of the '026 claims (nor are any of the '026 claims obvious over claim 141).

The PTO has on multiple occasions already held the intermediate of claim 141 to be separately patentable from the species and genus, thus obviating any public policy basis for the double patenting rejection for the intermediate claim 141. In particular, over ten years ago, the Office directly held that intermediate claim 141 is separately patentable from genus claim 140 and species claim 142 because, under the interference rules governing that interference, those three counts could exist only if they were separately patentable from each other. See also 37 C.F.R. § 1.601(f) (1993), stating, "When there is more than one count, each count shall define a separate patentable invention." Moreover, the interference rules clearly defined what constituted separate patentability: "Invention 'A' is a 'separate patentable invention' with respect to invention 'B' when invention 'A' is new (35 U.S.C 102) and non-obvious (35 U.S.C. 103) in view of invention 'B' assuming invention 'B' is prior art with respect to invention 'A'." 37 C.F.R. § 1.601(n) (1993). The interference went forward with three separately patentable counts. The Patent and Trademark Office affirmed separate counts despite objection by the opposing party, see e.g., Declaration of John F. Kadow, paragraph 16. This declaration is submitted together with the Information Disclosure Statement filed concurrently herewith. Ultimately Bouchard won all three counts.

Thus, the Office's position during the interference is clear: the intermediate of claim 141 is separately patentable from the genus of claim 140 and the species of claim 142 and of course, is thus also separately patentable from the '026 patent claims reciting, *inter alia*, the species of claim 142 but nowhere reciting any intermediate. Additionally, both the genus of claim 140 and the species of claim 142 can each be

produced from other intermediates. See Exhibit A, "Intermediates - First Access to Genus Compounds" and "Intermediates - Second Access to the Genus Compounds."

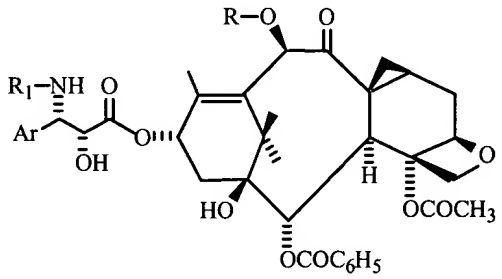
Moreover, because the Office has already declared on multiple occasions that intermediate claim 141 is separately patentable from the species of claim 142, there can be no violation of public policy in allowing the intermediate claim 141 over the claims of the '026 patent reciting, *inter alia*, the species of claim 142. Therefore, issuance of a patent on the patentably distinct intermediate claim 141 does not evergreen either the genus of claim 140 or the species of claim 142.

Thus, the double patenting rejection with respect to intermediate claim 141 should be removed.

B. <u>The Genus – Claims 140, 143, 145, 147, 149, 151, and 153</u>

The genus of claim 140, which is also recited in each of claims 143, 145, 147, 149, 151, and 153, is also separately patentable from any claim of the '026 patent. That genus is defined as:

A taxoid of the formula



(I)

in which

R represents hydrogen or acetyl,

R_1 represents benzoyl or R_2-O-CO- in which R_2 represents t-butyl, and

Ar represents phenyl or α- or β-naphthyl, said phenyl or naphthyl being unsubstituted or substituted by C_{1-4} alkyl, C_{1-4} alkoxy, halogen, or CF_3, or Ar represents 2- or 3-thienyl or 2- or 3-furyl, said thienyl or furyl being unsubstituted or substituted by halogen.

For the reasons explained below, under application of the two-way test for obviousness-type double patenting, no claim of the '026 patent is obvious over genus claim 140. All of the '026 patent claims recite, *inter alia*, the species of Claim 142: 4α-10β-diacetoxy-2α-benzoyloxy-5β,20-epoxy-1β-hydroxy-7β,8β-methylene-9-oxo-19-nor-11-taxen-13α-yl (2R,3S)-3-tert-butoxycarbonylamino-2-hydroxy-3-phenylpropionate. As will be explained, during the interference, it was held that the genus claim 140 and species claim 142 are separately patentable.

In setting up the interference, Applicants offered evidence, declarations of record by Dr. Lavelle, all of which are being submitted again in an overabundance of caution to be expressly considered by the present Examiner, who did not participate in the interference, to show that the genus claim 140 and species claim 142 are separately patentable. Dr. Lavelle's April 24, 1995, Declaration, attached herewith as Exhibit B, established that the multi-drug resistance properties of the species of Compound I were, better than the structurally similar Compounds II and III (which are included within the generic claims). See April 24, 1995, Lavelle Declaration at ¶ 9a.[4] In a Memorandum to

[4] In the interest of full disclosure, Applicants point out that in response to Dr. Lavelle's declaration, Chen submitted a March 7, 1996, Declaration from Dr. William C. Rose. This declaration is submitted together with the Information Disclosure Statement filed concurrently herewith. In his declaration, Dr. Rose opined that "the data contained in the Lavelle declarations do not demonstrate that Compound I has unexpected activity in (continued...)

the Board, the Examiner found all three counts were separately patentable. See Exhibit C, Initial Interference Memo of Johann Richter, August 10, 1995.

Thus, as with intermediate claim 141, discussed above, the Office has already made it's position clear that claim 140, reciting the genus, is separately patentable from the species of claim 142, which is also the species recited, *inter alia*, in the claims of the '026 patent. As discussed in detail in the attached Appendix, moreover, the contents of which are specifically incorporated herein, the Office has controlled the rate of prosecution of this application during the effective time period and the '026 claims could not have been presented in the present application, thus establishing, as explained in the Appendix, that Applicants are not somehow trying to "evergreen" their invention.

Hence, the obviousness-type double patenting rejection of pending claims 140, 143, 145, 147, 149, 151, and 153, reciting the genus, grounded on public policy and based on the species of claim 142 recited, *inter alia*, in the claims of the '026 patent, should be withdrawn.

.C. <u>The Species</u>

(...continued)
comparison to the remaining compounds of Count 1," and thus counts 1 and 2 are not patentably distinct. See Rose declaration at Point 5.

Dr. Lavelle responded to Dr. Rose's criticisms in a May 22, 1996, Declaration, which is also provided in the Information Disclosure Statement filed concurrently herewith. In this declaration, Dr. Lavelle provided additional test results to "strengthen [his] conclusion that Compound I is superior to Compounds II and III." May 22, 1996, Lavelle Declaration at Point 13. Dr. Rose countered with a July 3, 1996, Declaration, submitted in the Information Disclosure Statement filed concurrently herewith, which again criticizes Dr. Lavelle's declarations. Nonetheless, the Office never disagreed with Bouchard, allowing the interference to proceed with three separate, patentably distinct, counts.

Claim 142 (as well as claims 144, 146, 148, 150, 152, and 154), recites the species 4α-10β-diacetoxy-2α-benzoyloxy-5β,20-epoxy-1β-hydroxy-7β,8β-methylene-9-oxo-19-nor-11-taxen-13α-yl (2R,3S)-3-tert-butoxycarbonylamino-2-hydroxy-3-phenylpropionate, and is separately patentable over the claims of the '026 patent. As recognized by the Office, although all the claims of the '026 patent recite, *inter alia*, the species of claim 142, they only recite that species in combination with at least one other anti-cancer agent.

The Office continues to base its obviousness-type double patenting position of claim 142 on the public policy reasons, articulated in the present Office Action: "[w]hen the U.S. Patent 6,441,026 expires, cyclopropyltaxotere and the composition containing the same should be in the [ ] public domain[. G]ranting the current composition with a full patent term would prolong the protection of Applicant's cyclopropyltaxotere and its uses. The 'evergreening' of the current compound should not be permitted." Office Action at 3-4. The present Office Action concludes that the claims are not patentably distinct from each other.

In addition to what has been previously argued in prior responses, specifically incorporated by reference herein, Applicants have further considered the Office's argument that the claims of the '026 patent are not patentably distinct from Applicants' claims, but find that position flawed for the additional reasons explained below.

Specifically, as explained in detail in the Appendix, Applicant's are entitled to consideration under the two-way test. Under that two-way test, if the combination therapies of the claims of the '026 patent, including the species of claim 142 as an element of the combination, are separately patentable in view of the species of claim

142, there is no issue of double patenting. The evidence provided in the previously submitted declaration of Dr. Bissery (filed February 2, 2005) unequivocally establishes, and the Office agrees, that the combination therapies of the '026 patent are "unpredictable." Office Action at 3.

Thus, at best, the combination therapies of the claims of the '026 patent would have been obvious to try in view of the species of claim 142. Obvious to try, of course, is not a legitimate standard for assessing compliance with §103. See *In re Tomlinson*, 363 F.2d 928, 150 U.S.P.Q. 623 (C.C.P.A. 1966) and *Yamanouchi Pharmaceutical Co. Ltd. v. Danbury Pharmacal, Inc.*, 231 F.3d 1339, 56 U.S.P.Q.2d 1641 (Fed. Cir.), *reh'g denied*, 2000 U.S. App. LEXIS 34047 (2000).

The Office has provided no reasoned analysis why it will not accept that evidence nor has it provided any evidence to support a contrary conclusion. Based upon the Office's admission that Dr. Bissery's declaration establishes that the results are unpredictable (Office Action at 3), the Office cannot conclude that the combinations of the claims of the '026 are "obvious" in view of the species recited in claim 142.

Since the combinations of the '026 patent are not rendered obvious by the species of claim 142, there is no issue of obviousness-type double patenting. The two sets of claims are thus separately patentable; therefore, there can be no legitimate claim that Applicants are evergreening their invention. Applicants respectfully request withdrawal of the Examiner's rejection.

Therefore, for all those reasons, Applicants respectfully request the prompt allowance of all pending claims.

Respectfully submitted,

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MICHELE C. BOSCH, Reg. NO. 40,524

Dated: November 14, 2005

By: Michele C. Bosch
for Thomas L. Irving
Reg. No. 28,619

APPENDIX TO 1.129 RESPONSE

I. WHAT IS THE APPROPRIATE TEST FOR OBVIOUSNESS TYPE DOUBLE PATENTING: THE ONE-WAY TEST OR THE TWO-WAY TEST?

Obviousness-type double patenting is a judicially-created doctrine that serves to prevent a patent applicant from obtaining an unjustified extension on his patent term through claims presented in a patent application that are merely obvious variants over another commonly-owned patent. See *Eli Lilly and Co. v. Barr Labs., Inc.*, 251 F.3d 955, 967 (Fed. Cir. 2001). "The fundamental reason for the rule [of obviousness-type double patenting] is to prevent **unjustified** timewise extension of the right to exclude granted by a patent no matter how the extension is brought about." *Id.* at 968 (emphasis added and quotation marks omitted).

A threshold issue is whether the Federal Circuit's articulated one-way test or two-way test is to be applied in assessing present issues of double patenting. Although the general rule is that a more restrictive one-way test is applied, the present facts satisfy the exception articulated in *In re Braat*, 937 F.2d 589, 19 U.S.P.Q.2d 1289 (Fed. Cir. 1991) and thus mandate application of a more liberal two-way test. A complete discussion of this precedent, including a discussion of *In re Stanley,* 214 F.2d 151, 102 U.S.P.Q. 234 (CCPA 1954), which is factually analogous to the present situation as it also involved an application in interference, was provided in the response filed March 24, 2004 (specifically incorporated by reference herein) and will not be reiterated herein.

In summary, *Braat* recognized that while the rule against double patenting is to prevent unjustified timewise extensions of the patent right, in certain narrow instances, the extension of the right can be justified by application of a two way test. *Braat* and its predecessors grappled with the question of when it was necessary and/or justified to

apply the more liberal two-way test for distinctness to achieve a fair result. *Braat* found that the two-way test should apply when three conditions were satisfied:

(1) the applicant could not have included the patent claims in the application,

(2) the inventors of the application differed from those of the patent, and

(3) it was not the assignee's fault that the patent issued first.

*In re Braa*t, 937 F.2d at 593-94.

The Federal Circuit in the later case *In re Berg*, 140 F.3d 1428, 46 U.S. P.Q.2d 1226, (Fed. Cir. 1998), addressed the *Braat* two-way/one-way question. In *Berg,* the Court agreed with *Braat* that the one-way test should generally apply. They noted that the two-way test is an exception and that "the two-way exception can only apply when the applicant could not avoid separate filings, and even then, only if the PTO controlled the rates of prosecution to cause the later filed species claims to issue before the claims for a genus in an earlier application." Thus, applying the test articulated by the Federal Circuit in *Berg,* we must ask two questions, given that the inventorship in the present application is completely different from that recited in the '026 patent:

1) Could the claims of the later filed but earlier issued patent have been filed in the earlier filed application? and

2) Did the PTO control the rate of prosecution to cause the later filed claims to issue before the claims in the earlier application?

1. Could the Claims of the '026 Patent Have Been Filed in the Instant Application?

The present application was filed in 1993, based upon the discoveries described in the December 9, 1992, priority application. The subject matter of the '026 patent could not have been filed concurrently with the present application.

First, the research leading up to the filing of the '026 patent application had not even been started, much less completed, when the present application was filed. The subject matter of the '026 patent is directed towards a different invention, discovered by different inventors during a wholly different time period from the claims of the present application. Thus, for that reason, Applicants meet this prong of the Federal Circuit test, requiring that the subject matter of the later-filed patent application could not have been filed concurrently with the pending application.

Furthermore, while Applicants recognize that original claims 39-42 and 87-90 in the instant application were directed towards a cyclopropyl taxane in combination with a secondary treatment agent, not a single claim of the '026 patent can be presented in the instant application because of lack of written description support for all claims in the specification. Clearly, the scope of original pending claims and those of the later developed '026 invention differ.

Specifically, the following examples have been identified wherein the instant application provides no written description support for any of the '026 patent claims as follows:

the composition as claimed in claims 1-9 of the '026 patent;

a derivative as claimed in claims 1-9 of the '026 patent;

therapeutic synergy as claimed in claims 10-19 of the '026 patent;

the class of spindle poisons as claimed in claim 1; and

the class of topoisomerase inhibitors as claimed in claim 1.

For the Examiner's convenience, Applicants attach herewith a claim chart that illustrates that applicants lack sufficient basis in the instant application to have presented the claims of the '026 patent in the instant application.

Thus, since the inventions were made by different inventors at different times and since no claim of the '026 patent could have been properly made in the instant application, the conclusion that separate applications were necessary is inevitable, in satisfaction of requirements for application of the two-way test.

2. Did Applicants control the rate of prosecution causing the later filed application to issue before the earlier filed application?

No. The PTO, or more accurately, the complexity of the issues before the PTO and the need on the part of the PTO to resolve those issues prior to grant, controlled the rate of prosecution of the applications which resulted in the later filed application issuing as the '026 patent prior to the time the earlier filed presented application was returned to the PTO for examination following the complex and protracted interference proceedings. The present application has been pending for almost twelve years, having been filed in the PTO on December 8, 1993. The extended pendency past the issuance of the '026 patent was not at the request of or under the control of the Applicants, but rather has been due to a complex case, with complex issues in need of careful consideration and resolution by the Office, including the lengthy interferences culminating in Applicant's successful appellate defense at the Federal Circuit, of the Board's award to them of priority. Those complexities resulted in the present application being returned for prosecution after the issuance of the '026 patent.

Specifically, Applicants filed the present application in the U.S. on December 8, 1993. After initial prosecution, Applicants then filed a Request for Institution of an

Interference in this case. Following an Office Action dated May 23, 1995, suspending prosecution, the PTO (1) agreed with Applicants that there was interfering subject matter and declared an interference with a second party, Chen, on October 24, 1995, (2) redeclared, on its own initiative, the interference on February 24, 1999, to add a third party, Hester, and (3) finally, on January 31, 2000, reconsidered and reformulated the single interference into three interferences: *Chen vs. Hester*, *Chen vs. Bouchard*, and *Hester vs. Bouchard*.

In *Hester vs. Bouchard*, Hester conceded priority to Bouchard on all three counts, terminating that interference. In *Chen vs. Bouchard*, Bouchard defeated Chen on all three counts, receiving a Board ruling on August 2, 2002, which, after Chen appealed, the Federal Circuit affirmed on October 22, 2003. Once Bouchard prevailed against both Chen and Hester, the *Chen vs. Hester* interference ended with judgment being entered against both parties. After all that, the present application was not returned to the PTO until February 2004 for post-interference examination proceedings. As will now be explained, during the pendency of the initial prosecution and the subsequent highly complex interference proceedings, the PTO controlled the rate of prosecution of this application, which is why the present application was not returned to prosecution until February 2004, about 1.5 years after the '026 patent issued.

The Applicants believe they were reasonably diligent during the interference and the prosecution leading up to the declaration of the interference. There were substantial periods of time spent waiting for the PTO to resolve complex issues during the interference. For example, during the interference, Applicants filed a reply to Chen's Opposition motion and awaited a response from the PTO from July 28, 1997, until

February 24, 1999, a time period spanning over a year and a half, while the PTO considered the complicated issues. And when the PTO did take action again, the PTO added the third party Hester, which led to even more complex three-way proceedings over the course of about a year until January 31, 2000, when, as noted above, the PTO then reconsidered and split the single three-party interference into three separate two-party interferences. All of that took substantial time.

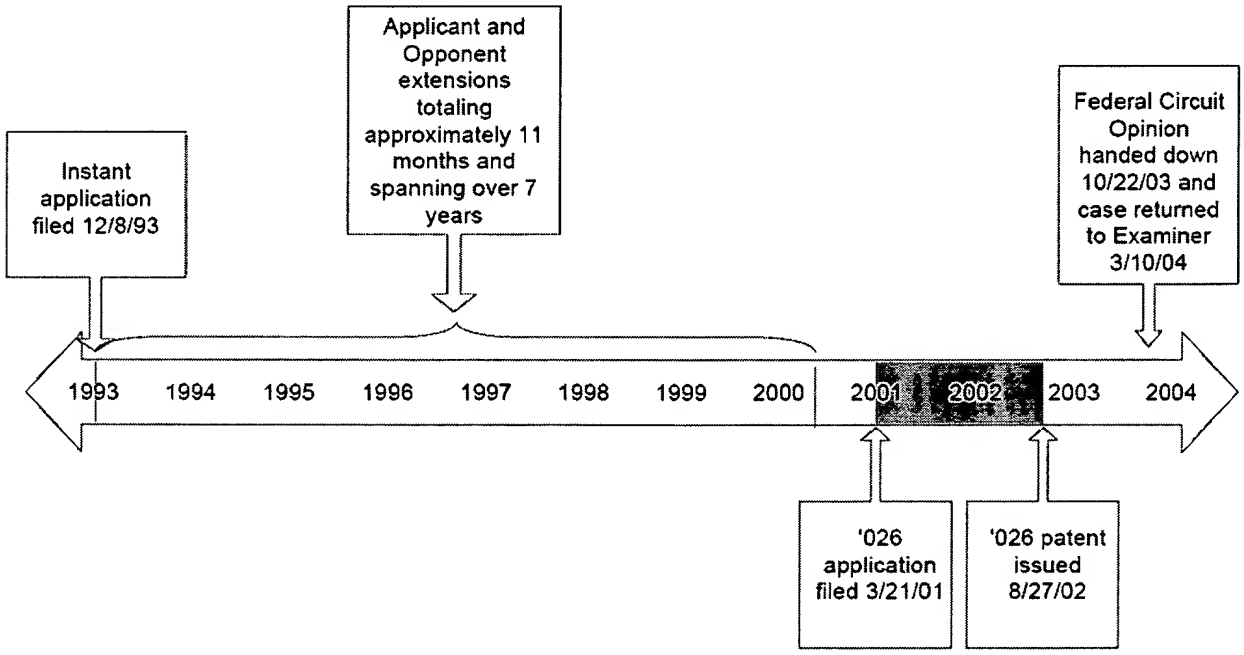
Shortly thereafter, moreover, Judge Mary Downey, who had been handling the interferences since inception in 1995, retired. At that point, on December 4, 2000, the Office notified Applicants that the interferences were being transferred to Judge Andrew Metz, which understandably required the Office to expend additional time studying the matter. Chen and Bouchard were called to Final Hearing before the Board on May 16, 2001. After Final Hearing, the Board needed until August 2, 2002, to issue a heavily factually oriented decision in favor of Bouchard comprising more than one hundred pages. Chen then appealed, extending resolution in favor of Bouchard until October 2003, when the Federal Circuit issued their decision after the '026 patent had issued the year before. It then took the Federal Circuit about four months to return the Bouchard application to the Examiner for further proceedings in about March 2004. The timeline below illustrates representative, but by no means exhaustive, time spent by the Patent and Trademark Office and the Federal Circuit resolving the issues, during which time Applicants had no control over the rate of prosecution . Thus, Applicants were not at fault that the '026 patent issued in August 2002, prior to return of the present application to ex parte prosecution.

The M.P.E.P., moreover, specifically recognizes that appeals and interferences may result in postponing the issuance of a patent, for which Applicants should not be penalized, thus requiring application of the two-way test rather than the more restrictive one way test: "[T]he resolution of legitimate differences of opinion that must be resolved in an appeal process or the time spent in an interference proceeding can significantly delay the issuance of a patent." M.P.E.P. § 804 II.B(1)(b) (supporting application of the two-way test when the Patent and Trademark Office has controlled the rate of prosecution).

To be sure, Applicants requested some reasonable extensions of time during the initial prosecution and interference and did not oppose reasonable requests for extensions of time by the opponents Chen and Hester. As can be seen from the file, the initial requests for interference were complex and involved complex supporting evidence. That all required substantial preparation time. The interferences themselves were, moreover, complex, with extensive motion practice, as well as presentation of voluminous testimony by Chen, in two of the interferences, which testimony spanned many months over a period of years and involved the cross-examination of many witnesses. The '026 patent, on the other hand, was filed on March 21, 2001, and issued on August 27, 2002 after a first action allowance.

Even had Applicants or their opponents requested no extensions of time at all, such as, during the interference or during ex parte prosecution before the interference was declared, the '026 patent still would have issued before resolution of the interference proceeding in the instant application and return of that application to the examiner for subsequent examination. Specifically, Applicants have reviewed the

lengthy interference and application files and determined that extensions obtained by Applicants ex parte before the interference was declared and extensions taken by Applicants and their opponents during the course of interference before the '026 patent issued amounted to only approximately eleven months. All occurred before the March 21, 2001, filing date of the '026 patent, as illustrated below. Thus, even had Applicants or their opponents taken no extensions of time at all, saving some 11 months, the '026 patent issued in August 2002 approximately 17 months before the interference ended and the application was returned in March 2004 for examination . And since 17 is greater than 11, the '026 would still have issued before the interference ended and prosecution resumed even if there had been no extensions of time in the pre-interference ex parte prosecution of this application and in the interferences.



Thus, measured against the almost twelve years of pendency, those 11 months of reasonable extensions did not control the earlier issuance of the '026 patent. Furthermore, any extensions taken by Applicants in an attempt to resolve the issues

raised after the interference ended and prosecution resumed, such as the currently applied double patenting rejections, have no bearing on control of the pendency, since the '026 patent has already issued before the present application was returned to Applicants for continued ex parte prosecution.

II. CONCLUSION

In sum, the more liberal two-way test applies, as Applicants could not have avoided separate filings by filing only one application and the PTO controlled the rate of prosecution, causing the later-filed application to issue first. And under that two-way test, there is no obviousness-type double patenting over the claims of the '026 patent for either the genus of claim 140 or the species of claim 142. Moreover, under either a one-way or a two-way analysis, there is no obviousness-type double patenting over the claims in the '026 patent for the intermediate of claim 141. Thus, in light of the discussions presented herein and in the accompanying Response, Applicants respectfully request reconsideration of the obviousness-type double patenting rejection and withdrawal of all outstanding rejections.

Chart Establishing that the Claims of the '026 Patent
are Not Supported by the Disclosure of the Present Application

CLAIMS OF THE '026 PATENT	DISCLOSURE FROM THE 08/162,984 APPLICATION ("BOUCHARD")
1. A pharmaceutical composition comprised of the compound of formula I:	**Bouchard discloses no multi-drug compositions.** In contrast, Bouchard discloses starting at page 46, line 7 "The therapeutic treatment can be performed concurrently with other therapeutic treatments . . . ."
Formula for cyclopropyltaxane	Support for cyclopropyltaxane based upon the award of priority in the interference.
Or a derivative thereof,	**No disclosure of derivatives of cyclopropyltaxane.**
And at least one of an alkylating agent	Page 46, line 17 "alkylating agents"
An antimetabolite	Page 46, line 22 "antimetabolites"
A spindle poison	Bouchard does not use the word "spindle poison" but at page 46, lines 25-26, discloses "natural products like vinca alkaloids such as vinblastine, vincristine and vindesine." In the '026 patent at column 1, lines 45 to 46 is disclosed "spindle poisons including vinca alkaloids such as vinblastine or vincristine or their synthetic analogues such as navelbine or estramustine"
An epidophyllotoxin	Page 46, line 27 "epidophyllotoxins"
An antibiotic	Page 46, line 28 "antibiotics"
An enzyme	Page 47, line 2 "enzymes"
A topoisomerase Inhibitor	**No disclosure of topoisomerase inhibitor.**
A platinum coordination complex	Page 47, line 3 "coordination complexes of platinum"
A biological response modifier or	Page 46, lines 10-11 "biological response modifiers"
A growth factor inhibitor	Doesn't use the phrase "growth factor inhibitors," but it discloses at page 46, lines 11-14, "The response modifiers include, with no limitation being implied, lymphokines and

	cytokines such as interleukins, interferons . . . ."
2. The pharmaceutical composition according to claim 1, wherein the antibiotic is chosen from	Page 46, line 28 "antibiotics"
Daunorubicin	Page 46, line 28 "daunorubicin"
Doxorubicin	Page 47, line 1, "doxorubicin."
Bleomycin, and	Page 47, line 1, "bleomycin."
Mitomycin.	Page 47, line 1, "mitomycin."
3. The pharmaceutical composition according to claim 1, wherein the spindle poison is chosen from	Bouchard does not use the word "spindle poison" but it discloses at page 46, lines 25-26 "natural products like vinca alkaloids such as vinblastine, vincristine and vindesine."
vinca alkaloids, the synthetic or semi-synthetic analogues,	Bouchard discloses as page 46, line 25 "vinca alkaloids," but there is no discussion of synthetic or semi-synthetic analogues.
Estramustine, or	**No disclosure of Estramustine.**
Navelbine.	**No disclosure of Navelbine.**
4. The pharmaceutical composition according to claim 1, wherein the topoisomerase inhibitor is chosen from	**No disclosure of topoisomerase inhibitor.**
Camptothecin,	**No disclosure of Camptothecin.**
And its derivative including CPT-11	**No disclosure of CPT-11.**
Topotecan and	**No disclosure of Topotecan.**
Pyridobenzoindole derivatives	**No disclosure of Pyridobenzoindole derivatives.**
5. The pharmaceutical composition according to claim 1, wherein the platinum coordinating complex is chosen from	Page 47, line 3, "coordination complexes of platinum."
Cisplatin and	Page 47, line 3, "cisplatin"
Carboplatin	**No disclosure of "carboplatin."**
6. The pharmaceutical composition according to any one of claims 2 to 5 further comprising growth factors	Discloses at page 46, lines 11-14, "The response modifiers include with no limitation being implied, lymphokines and cytokines such as interleukins, interferons . . . ."

Of the haematopoietic type.	**No disclosure of growth factors of the "haematopoietic type."**
7. A method of administering the constituents of the composition as claimed in any one of claims 2 to 5,	Discloses that the therapeutic treatments can be concurrent. There is no more specific disclosure than that. See page 46, line 8.
Wherein the administration is separate	Disclosure of concurrent administration but no more specific discussion
And simultaneous.	No description of simultaneous administration.
8. A method of administering the constituents of the compositions as claimed in any one of claims 2 to 5,	Discloses that the therapeutic treatments can be concurrent. There is no more specific disclosure than that. See page 46, 8.
Wherein said administration is separate	Disclosure of concurrent administration but no more specific discussion
And sequential.	Disclosure of concurrent administration but no more specific discussion
9. A method of administering the constituents of the compositions as claimed in claims 2 to 5,	Discloses that the therapeutic treatments can be concurrent. There is no more specific disclosure than that. See page 46, 8.
Wherein said administration is separate	Disclosure of concurrent administration but no more specific discussion
And spaced over time.	**No description of the treatments being spaced over time.**
10. A pharmaceutical composition having therapeutic synergy	**No disclosure of therapeutic synergy.**
In the treatment of neoplastic disease	Page 43, line 15 to page 44, line 11 describes the disease states treatable. Cancers, etc. are mentioned, but the class of neoplastic diseases is not described with specificity. Page 46, lines 7-9 discloses treatment with antineoplastic drugs.
Comprising a compound of the formula Formula for cyclopropyltaxane	Support for the cyclopropyl taxane is based upon the award of priority in the interference.
And doxorubicin.	Page 47, line 1.

11. A pharmaceutical composition having therapeutic synergy	**No disclosure of therapeutic synergy.**
In the treatment of neoplastic disease	Page 43, line 15 to page 44, line 11 describes the disease states treatable. Cancers, etc are mentioned, but the class of neoplastic diseases is not described with specificity. Page 46, lines 7-9 discloses treatment with antineoplastic drugs.
Comprising a compound of the formula Formula for cyclopropyltaxane	Support for cyclopropyltaxane based upon the award of priority in the interference.
And navelbine.	**No disclosure of navelbine.**
12. A pharmaceutical composition having therapeutic synergy	**No disclosure of therapeutic synergy.**
In the treatment of neoplastic disease	Page 43, line 15 to page 44, line 11 describes the disease states treatable. Cancers, etc are mentioned, by the class of neoplastic diseases is not described with specificity.
Comprising a compound of the formula Formula for cyclopropyltaxane	Support for cyclopropyl taxane based upon the award of priority in the interference.
And cisplatin.	Page 47, line 3.
13. A pharmaceutical composition having therapeutic synergy	**No disclosure of therapeutic synergy.**
In the treatment of neoplastic disease	Page 43, line 15 to page 44, line 11 describes the disease states treatable. Cancers, etc. are mentioned, but the class of neoplastic diseases is not described with specificity. Page 46, lines 7-9 discloses treatment with antineoplastic drugs.
Comprising a compound of the formula Formula for cyclopropyltaxane	Support for cyclopropyl taxane based upon the award of priority in the interference.
And CPT-11.	**No disclosure of CPT-11.**
14. The pharmaceutical composition of any one of the claims 10 to 13 wherein the constituents of the composition are administered simultaneously.	Discloses that the therapeutic treatments can be concurrent. There is no more specific disclosure than that. See page 46, 8.
15. The pharmaceutical composition of any one of	Disclosure of concurrent administration but nothing more

claims 10 to 13 wherein the constituents of the composition are administered separately and simultaneously.	specific; no disclosure of simultaneous administration, merely "concurrent." Page 46, line 8.
16. The pharmaceutical composition of any one of claims 10 to 13 wherein the constituents of the composition are administered separately and semi-simultaneously.	Disclosure of concurrent administration but nothing more specific; no disclosure of simultaneous administration, merely "concurrent." Page 46, line 8.
17. The pharmaceutical composition of any one of claims 10 to 13 wherein the constituents of the composition are administered separately and sequentially.	Disclosure of concurrent administration but nothing more specific; no disclosure of simultaneous administration, merely "concurrent." Page 46, line 8.
18. The pharmaceutical composition of claim 10 or claim 11 wherein the neoplastic disease is breast cancer.	Page 44, line 1.
19. The pharmaceutical composition of claim 12 or claims 13 wherein the neoplastic disease is colon cancer.	Page 27, line 25. Page 44, line 1.

Summary:

Claims 1-9 of the '026 patent could not have been presented in the present application at least because the present application contains:

no disclosure of multi-drug compositions;
no disclosure of derivatives of cyclopropyltaxanes;
no disclosure of topoisomerase inhibitors;
no disclosure of synthetic or semi-synthetic analogues of vinca alkaloids;
no disclosure of Estramustine;
no disclosure of Navelbine;
no disclosure of Topotecan;
no disclosure of Pyridobenzoindole;

no disclosure of Camptothecin;
no disclosure of CPT-11;
no disclosure of carboplatin;
no disclosure of growth factors of the "haematopoietic type"; and
no disclosure of administration spaced over time.

Claims 10-19 of the '026 patent could not have been presented in the present application at least because the present application contains:

no disclosure of therapeutic synergies;
no disclosure of navelbine; and
no disclosure of CPT-11.